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IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NW INS. CORP., Respondent. and MONTANA STATE FUND, Intervenor,	WCC NO. 2001-0300 PETITIONER'S BRIEF REGARDING COMMON FUND AND RETROACTIVITY ISSUES

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and submits the following Petitioner's Brief Regarding Common Fund and Retroactivity Issues. The Petitioner is submitting her brief in response to the Court's Order of February 20, 2004.

PROCEDURE

On June 22, 2001, this Court held that section 39-72-706, MCA (1989-1999) (apportionment of benefits) violated the Equal Protection Clauses of the United States and Montana Constitutions. The Court's decision was affirmed on appeal by the Montana Supreme Court on April 10, 2003.

Following the decision of the Montana Supreme Court, the Petitioner filed a notice of intent to claim common fund attorney fees on all occupational disease cases in which an apportionment was taken prior to and including June 22, 2001, for dates of occupational diseases occurring on or after July 1, 1987. An attorney fee lien of 25% was asserted against

all insurers providing workers' compensation benefits to Montana workers for occupational diseases occurring from July 1, 1987, through June 22, 2001.

After several hearings before the Court, it was agreed that the parties, the Petitioner, Liberty NW Ins. Corp., and the Intervenor, Montana State Fund, would prepare stipulated facts so as to allow the briefing of several issues concerning the retroactive application of the *Schmill* decision. The parties have filed their stipulated facts and have agreed to present the following issues to the Court for resolution at this time:

1. Does the failure to request common fund fees or class certification in the pre-remand proceedings in *Schmill* bar the Petitioner from now requesting common fund fees or class certification?

2. Does the appellate decision in *Schmill,* 2003 MT 80, apply retroactively?

3. Does the appellate decision in *Schmill,* 2003 MT 80, create a common fund? If so, as a general matter, what claimants are encompassed by the common funds?

4. If a common fund is created as a result of the appellate decision in *Schmill,* 2003 MT 80, is the common fund limited solely to claimants insured by the named respondent, or does the fund encompass all claimants irrespective of their insurers?

ARGUMENT

Summary of Arguments

I. Failure to Plead Common Fund Fees

The Montana Supreme Court has held that there is no waiver of attorney fees based upon a failure to plead defense when the defendant had notice of and an opportunity to defend against the attorney fee request. *Mountain West Farm Bureau Mutual Ins. Co. v. Brewer,* 2003 MT 98, 315 Mont. 231, 69 P.3d 652. Moreover, where the attorney fees are provided by statute and the attorney fee entitlement does not arise until after the claimant has prevailed on appeal, post remand fees cannot be denied based upon a failure to plead defense. *In Re Estate of Lande*, 1999 MT 179, 295 Mont. 277, 983 P.2d 316. This Court has similarly ruled in *Flynn v. State Compensation Ins. Fund*, 2003 MT WCC 55 (order dated August 5, 2003).

II. Retroactivity

In *Schmill v. Liberty NW Ins. Corp.*, 2003 MT 80, 315 Mont. 51, the Petitioner challenged the constitutionality of section 39-72-706, MCA, the occupational disease

apportionment statute. The Petitioner asserted that the statute violated the Equal Protection Clauses of both the Montana and United States Constitutions. This Court and the Montana Supreme Court agreed, striking down the statue as unconstitutional. The Defendants have refused to apply the statute retroactively asserting that Montana law requires the satisfaction of a three-part test prior to the retroactive application of a judicial decision and that this case cannot satisfy that test. The Defendants' arguments fail for two reasons.

First, since the apportionment statute was found unconstitutional, the statute was void ab initio. A statute which is void ab initio is unenforceable from the date of its enactment, not from the date of the decision finding it unconstitutional. To conclude otherwise would lead to absurd results. It would require courts to enforce an unconstitutional statute up to a certain date and then not enforce it thereafter. The law does not promote absurd results. *Montana Power Co. v. Montana Public Service Com'n*, 305 Mont. 260, 26 P.3d 91 (2001).

Second, if the Court determines the apportionment statute was not void ab initio, case law from the Montana Supreme Court requires the use of the per se retroactivity rule. When the Montana Supreme Court has been asked to chose between the old three-factor retroactivity test and the per se rule, the Court has always applied the latter.

III. Did *Schmill* create a common fund?

There can be no dispute that a common fund was created as a result of the decision in *Schmill*. The common fund doctrine is generally defined as follows:

> "[W]hen a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund." *Murer v. State Compensation Mutual Ins. Fund,* 283 Mont. 210, 223, 942 P.2d 69, 76 (1997).

The precedent established in this case created a common fund. Each claimant whose benefits were reduced pursuant to the apportionment statute will now be entitled to receive those unpaid benefits. The payment of such benefits creates a common fund "which directly benefits an ascertainable class of non-participating beneficiaries." *Murer*, 283 Mont. at 223, 942 P.2d at 76.

IV. Does a *Schmill* common fund apply to nonparty insurers?

A *Schmill* common fund attorney fee applies to the entire common fund created

by the *Schmill* decision. Since that common fund includes benefits payable from all insurers who had previously apportioned occupational disease benefits, the common fund attorney fee attaches to all such benefits. This is so because all claimants who receive additional benefits are required to contribute to the creation of the common fund by paying their share of the litigation expenses.

Moreover, this Court has jurisdiction to order that attorney fees be paid by all beneficiaries whether they were a party to the litigation or not. The common fund attorney fee action is an action in rem. As such, the Court acquired jurisdiction of the subject-matter when the claim for fees was brought against the common fund. Pursuant to that jurisdiction, the Court has the equitable power to exercise dominion over the common fund and thus to assess fees.

I. Failure to Plead Common Fund Fees

Entitlement to attorney fees in workers' compensation cases is provided by statute. §§39-71-611 and -612, MCA. The Supreme Court has held that where a statutory fee entitlement exists, it is not necessary to specifically plead a claim for attorney fees to have them awarded post-trial. *In re Estate of Lande,* 295 Mont. 277, 983 P.2d 316 (1999). The Court reasoned as follows:

> The purpose of pretrial orders are to "prevent surprise, simplify the issues, and permit the parties to prepare for trial." *Nentwig v. United Industry, Inc.,* 256 Mont. 134, 138-39, 845 P.2d 99, 102 (1992). Requiring inclusion in the pretrial order of a request for attorney fees pursuant to §72-12-206, MCA, which mandates such fees in the event the party successfully defends the validity of a will, would not further those purposes. **Indeed, where attorney fees are a straight forward statutory entitlement in the event a party prevails in the action, no surprise could result from a post trial claim by such a successful party for the statutorily-mandated fees. In addition, inclusion in the pretrial order of the subject of attorney fees which become an entitlement only after the prevailing party has been determined at trial could neither simplify trial issues nor allow for better trial preparation, since no evidence need be presented on the question and no legal determinations are required before or during trial.** [Emphasis added.] *In re Estate of Lande,* ¶26.

The Court reaffirmed the *Lande* holding in the recent case of *Mountain West Farm Bureau Mutual Ins. Co. v. Brewer*, 2003 MT 98, 315 Mont. 231, 69 P.3d 652 (2003). In *Brewer*, the plaintiff filed a declaratory judgment action seeking to establish insurance

coverage under a Mountain West policy. The plaintiffs filed a motion for summary judgment on the coverage issue and the lower court entered summary judgment in favor of the insurer. The plaintiffs appealed. The summary judgment was reversed on appeal and thereafter the plaintiffs filed a motion seeking attorney fees. The insurer rejected the demand for fees stating that since the plaintiffs had not specifically asked for fees as part of their motion for summary judgment, they had waived their right to seek them. The insurer based its waiver defense on the argument that it did not have notice of the attorney fee claim and, therefore, did not have an opportunity to defend against the claim. The lower court agreed with the defendant and denied the plaintiffs' motion for fees and the case was appealed a second time.

The Supreme Court rejected the insurer's waiver defense finding both notice and an opportunity to defend. The Court reasoned as follows:

> Here, Mountain West had notice of the Christensens' desire to seek attorney fees as they specifically prayed for such relief in their initial Petition for Declaratory Relief. Like the defendant in *Kunst* (opportunity to defend against claim at oral argument on attorney fee motion), Mountain West had an opportunity to defend against the request for attorney fees, which it successfully did in the district court. Finally, the Christensens had not prevailed until we remanded the matter to the district court. Thus, waiting to file a motion for attorney fees until prevailing on appeal was proper. For these reasons, we conclude that the Christensens did not waive their entitlement to attorney fees. *Mountain West Farm Bureau,* 315 Mont. at 235.

In the *Schmill* case, a request for attorney fees was made in the Petition for Hearing. The fact that the request was not for common fund attorney fees is not relevant. There are no facts in the *Schmill* case which establish that the insurer would have defended the underlying claim any differently had there been a claim for common fund attorney fees. The issue in *Schmill* was the constitutionality of a statue. Nothing in the argument surrounding that issue turned on whether or not Claimant's counsel would seek common fund attorney fees if successful on appeal. The fact that an attorney fee claim was made in the Petition for Hearing is consistent with the facts of *Mountain West*. In light of such facts, neither estoppel, nor res judicata would apply.

On the issue of notice and opportunity to be heard, the Supreme Court found in *Mountain West* that the defendant's rights in that regard were satisfied when the court held a hearing on the plaintiffs' motion for attorney fees. The defendants in the common fund cases are certainly getting plenty of opportunity to defend against the attorney fee claims and thus have no basis to claim lack of notice.

Moreover, it would not appear that a notice argument is a valid defense in this case.

Unlike *Mountain West*, where the plaintiff was asking the court to order the insurance company to pay attorney fees from the insurer directly, the plaintiffs in the common fund cases are asking that attorney fees be paid from the claimants' benefits which comprise the common fund. While the insurer has to do some administrative work in order to issue payment of the claimed attorney fees, the fees, themselves, are not coming directly from the insurer's assets, but from other claimants' benefits. Under such circumstances, the insurer has no right to claim lack of notice.

The definition of the common fund doctrine itself, further supports the foregoing arguments. The common fund doctrine provides:

> "[W]hen a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement of his or her reasonable attorney fees from the proceeds of the fund itself." [Emphasis added.] *Murer v. State Com. Mut'l Ins. Fund,* 283 Mont. 210, 222, 942 P.2d 69, 76 (1997).

According to the foregoing definition, payment of attorney fees from the proceeds of a common fund is in the nature of a "reimbursement," not a "claim." The attorney fee reimbursement arises (1) when a party with an interest in the common fund (2) incurs legal fees in order to establish the fund. *Mountain West Farm Bureau Mut'l Ins. Co. v. Hall,* 308 Mont. 29, 34, 38 P.3d 825, 828 (2001). Therefore, since a common fund attorney fee reimbursement does not arise until after the fund is created, there can be no requirement to request such fees in advance. That would be the equivalent of making a demand for settlement before the claim was even filed. The law does not require frivolous acts. *Lindey's v. Professional Consultants,* 244 Mont. 238, 242, 797 P.2d 920, 923 (1990).

For the foregoing reasons, as well as those expressed in the Court's decision in *Flynn v. State Compensation Ins. Fund*, 2003 MTWCC 55, ¶¶8-14, the Court should find that the timing of the request for common fund fees does not bar the validity of the request. If the criteria are met, the right to attorney fee reimbursement arises as a matter of law. The undersigned would ask the Court to so rule.

II. Retroactivity

This Court has previously held that all judicial decisions are applied retroactively. *Klimek v. State Compensation Ins. Fund*, WCC No. 9602-7492, order and partial summary judgment (October 11, 1996); *Miller v. Liberty Mutual Fire Ins. Co.*, 2003 MTWCC 6; and *Flynn v. State Compensation Ins. Fund*, 2003 MTWCC 55. The reasoning employed by the Court in the prior cases is equally applicable to *Schmill*. Moreover, since the decision in *Schmill* struck down a statute as unconstitutional there are even more legally compelling reasons to apply the *Schmill* decision retroactively.

A. An Unconstitutional Statute is Void Ab Initio

A distinction must be made between the retroactive application of a judicial decision which changes the law and one which declares a law unconstitutional. It is a longstanding principle of jurisprudence that an unconstitutional statute is void ab initio:

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed, that is, it is void ab initio. 16 Am. Jur. 2d Constitutional Law §203 [footnotes omitted, emphasis added].

The Montana Supreme Court has applied this principle of law on numerous occasions finding unconstitutional statutes void ab initio. In *Ex parte Anderson*, 125 Mont. 331, 238 P.2d 910 (1951), a statue banning the exportation of females for criminal purposes was found unconstitutional by the Court under the Supremacy and Commerce Clauses of the United States Constitution. The Court went on to hold:

> "'[A]n unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' *Ex parte Siebold*, 100 U.S. 371, 376, 25 L.Ed. 717. The statute under which the information was drawn being void, the information is wholly insufficient, fails to state a public offense, and petitioner's demurrer thereto should have been allowed." *Anderson*, 125 Mont. at 336-37, 238 P.2d at 913. [Emphasis added.]

In *Sadler v. Connolly*, 175 Mont. 484, 575 P.2d 51 (1978), the constitutionality of the freeholder requirements of statutes governing qualifications for city office were challenged. The Montana Supreme Court found the statutes unconstitutional as violative of the Equal Protection Clause of the United States Constitution. The Court then held:

> "A legislative enactment declared unconstitutional is void. *State ex rel. Schultz-Lindsay v. Lindsay Const. Co. v. Bd. of Equalization*, 145 Mont. 380, 403 P.2d 635 (1965); *Billings Properties, Inc. v. Yellowstone Co.*, 144 Mont. 25, 394 P.2d 182 (1964). As such, the enactment in legal contemplation is as inoperative as if it had never been passed." *Sadler*, 175

Mont. at 490, 575 P.2d at 54. [Emphasis added.]

In *Trusty v. Consolidated Freightways*, 210 Mont. 148, 681 P.2d 1085 (1984), the Court found a statute it had previously declared to be unconstitutional to be void and thus unenforceable in a subsequent case:

> "In *McClanathan*, *supra*, this Court struck down the former statute by ruling it constitutionally unenforceable. This 100% offset provision in the statute became void and unenforceable as a result of the *McClanathan* decision . . . Appellant [Trusty] suffered his injury during the period the 100% offset statute was in effect. *McClanathan* left no enforceable offset statute that could be applied to persons injured during the period between July 1, 1973 [effective date of the 100% offset statute] and July 1, 1974 [date of the 50% offset statute]. Therefore, no offset against appellant's benefits applies. . . This court cannot come back and change the statute to a 50% offset. Once we found the statute constitutionally unenforceable, then no offset remains in effect." *Trusty*, 210 Mont. at 151-52, 681 P.2d at 1087-88. [Emphasis added.]

In *Brockie v. Omo Const., Inc.*, 268 Mont. 519, 887 P.2d 167 (1994), the Court again had an opportunity to comment on the retroactivity of a decision finding a statute unconstitutional:

> "Appellant's notice of subsequent authority pursuant to our decision in *Newville* asks us to apply *Newville* retroactively to the wrongful death award. In that case, we concluded that the allocation of percentage of liability to non-parties violates substantive due process. We held that the relevant portion of §27-1-703(4), MCA, is unconstitutional. When a statute is declared unconstitutional, it is void ab initio. *Brockie*, 268 Mont. at 525, 887 P.2d at 171. [Citations omitted, emphasis added.]

According to Black's Law Dictionary (5th Edition), void ab initio means "null from the beginning." Thus, when a statute is found unconstitutional and is thus declared to be void ab initio, it means that the unconstitutionality of the statute dates from the statute's enactment. The Montana Supreme Court enunciated this principle in *Haugen v. Blaine Bank of Montana*, 279 Mont. 1, 8, 926 P.2d 1364, 1368 (1996):

> "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." [Citations omitted.]

Similarly, in *State v. Goebel*, 2001 MT 155, 306 Mont. 83, 31 P.3d 340, the Court explained that "a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision." *Goebel*, ¶23.

The foregoing review of the relevant case law clearly establishes that a statute found to be unconstitutional is unconstitutional from the day of its enactment, not from the date of the judicial decision finding it unconstitutional. Since the apportionment statute was found to be unconstitutional, the Court must conclude that the statute did not exist at anytime in the past. In the absence of an apportionment statute, the Respondents are liable for payment of full compensation benefits to occupational disease claimants with claims arising on and after July 1, 1987, through June 22, 2001.

B. The Per Se Retroactivity Rule Applies.

There is nothing in the arguments advanced by the defendants which should persuade the Court not to apply the holdings in the common fund cases retroactively. First, there can be no real dispute that the law in Montana requires retroactive application of judicial decisions. In 1993, the U.S. Supreme Court adopted a blanket rule that all judicial decisions were to be given retroactive effect. *Harper v. Virginia Dept. of Tax'n,* 509 US 86, 113 S.Ct. 2510, 125 L. Ed. 2nd 74 (1993). Following immediately in the shadow of that decision came four rulings from the Montana Supreme Court which employed the blanket rule and gave full retroactive effect to the judicial decisions in question. *Porter v. Galarneau,* 275 Mont. 174, 911 P.2d 1143 (1996); *Kleinhesselink v. Chevron USA,* 277 Mont. 158, 920 P.2d 108 (1996); *Lacock v. 4B's Restaurants, Inc.,* 277 Mont. 17, 22, 919 P.2d 373, 376 (1996); *Haugen v. Blaine Bank of Montana,* 279 Mont. 1, 8, 926 P.2d 1364, 1368 (1996).

While acknowledging this case law, the defendants argue that Montana has reverted back to the old retroactivity test by directing the Court's attention to two cases decided in 1998 and 2000. *See, Seubert v. Seubert,* 301 Mont. 399, 13 P.3d 365 (2000); *Benson v. Heritage Inn, Inc.,* 292 Mont. 268, 971 P.2d 1227 (1998). It is true that both cases used the old retroactivity test, however, it is also true that they did so without any discussion or recognition of the four cases between 1993 and 1996 which adopted the new rule. This fact makes those decisions suspect.

When the Montana Supreme Court overrules a prior decision, it does so cautiously and with a full explanation. This is so because of the rule of stare decisis, "which means to abide by or adhere to decided cases." The rule exists to preserve "stability, predictability, and equal treatment." *Sleath v. West Mont Home Health Ser., Inc.,* 304 Mont. 1, 19, 16 P.3d 1042, 1053 (2000); *Haugen,* 926 P.2d at 1368. "The doctrine is meant to keep courts from lightly overruling past decisions, in order to heed the necessity for stability and predictability in the law." *Sleath,* 304 Mont. at 19, 16 P.3d at 1053.

Neither of the recent cases which employed the old retroactivity test acknowledged that conflicting case law existed, let alone explained the departure from the recently

established precedent of giving full retroactivity to judicial decisions. As such, these decisions must be rejected as inconsistent with Montana law and thus inapplicable to the present common fund fee cases.

Even if the Court feels compelled to judge each of the common fund cases by the old retroactivity test (hereafter *"Chevron Oil"*), the decision in *Schmill* should be applied retroactively. The retroactivity factors set out in *Chevron Oil* are as follows:

> 1. Whether the ruling to be applied retroactively establishes a new principle of law "by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed;"
>
> 2. Whether retroactive application will further or retard the rule's operation; and
>
> 3. Whether retroactive application will result in a substantial inequity. *Benson,* ¶24 (quoting *Riley v. Warm Springs State Hosp.,* 229 Mont. 518, 748 P.2d 455, 457 (1987).)

Considering the first factor, it is undisputed that *Schmill* did not establish a new principle of law by overruling precedent or deciding an issue of first impression whose result was not clearly foreshadowed. The holding in *Schmill* was that the apportionment statute contained at section 39-72-706, MCA, was unconstitutional on equal protection grounds. In *Henry v. State Compensation Ins. Fund,* 294 Mont. 449, 982 P.2d 456 (1999), the Montana Supreme Court struck down a portion of the Workers' Compensation Act as unconstitutional on the same equal protection grounds. The issue in *Henry* was whether occupationally diseased workers could be denied rehabilitation benefits solely on the basis that their condition was classified as an occupational disease as opposed to an industrial injury. The Supreme Court found that such disparate treatment was unconstitutional based upon the legislature's revised definition of industrial injury in the 1987 Workers' Compensation Act. The Court went onto use the same reasoning in *Stavenjord v. Montana State Fund,* 2003 MT. 67, when it held that occupational disease claimants were entitled to settlement benefits under the industrial injury provisions of the Workers' Compensation Act. Both of these cases foreshadowed the *Schmill* decision and thus the first retroactivity factor set forth in *Chevron Oil* would be answered in the negative.

The second factor requires a determination of whether the retroactive application of the *Schmill* decision will further its operation. It is clear that it will. The effect of the *Schmill* decision is to treat injured workers and occupationally diseased workers the same when it comes to the calculation of their temporary total disability rates. In other words, the elimination of the apportionment will require insurers to pay occupational disease claimants the same TTD benefits as injury claimants. If the decision is applied retroactively, the same equalization of benefits will occur. What is important about the *Schmill* decision being applied

retroactively is that there is no potential for a negative impact upon any claimant. Therefore, the retroactive application of the decision will further its operation.

The last factor asks whether a retroactive application will result in substantial inequity. As note above, retroactive application of the *Schmill* decision will not result in any persons or entities being adversely affected. On the other hand, a failure to apply the decision retroactively would result in substantial inequity. For example, a pre-June 22, 2001, claimant assessed a 50% apportionment as a result of a pre-existing back condition which was aggravated by an occupational disease would receive $219.50 per week in TTD benefits, while a claimant who suffered a similar occupational disease on June 25, 2001, would receive $439.00 per week in TTD benefits. This difference in TTD rates would constitute a substantial inequity.

In terms of inequities to the insurer, as this Court noted in *Flynn, supra*, the insurer bears the burden of convincing the Court "the retroactive application would result in substantial inequitable results." [Citations omitted.] *Flynn* at ¶34. With regard to the *Schmill* decision, the retroactive application of the decision would create little to no inequities. To remedy the apportionment the insurer simply needs to do a quick mathematical calculation. Since apportionment did not apply to medical benefits even before the decision in *Schmill,* and since there was no entitlement to impairment benefits, rehabilitation benefits, or settlement benefits greater than $10,000.00, the only calculations needed to remedy past inequities would be the recalculation of the TTD rate, and the recalculation of the claimant's entitlement to the full $10,000.00 in settlement monies.

Moreover, according to the stipulated facts, Liberty NW (LNW) has identified 909 occupational disease claims between July of 1988, and August of 2003, while the Montana State Fund (MSF) has identified 3,543 claims between July 1, 1987, and June 30, 2002. (LNW Stipulated Fact Nos. 1-3; MSF Stipulated Fact Nos. 26-29.) Not all of these involved an apportionment of benefits, but each would have to be reviewed to make that determination. Those numbers are not so significant so as to impose a substantial burden on either LNW or the MSF. Pursuant to *Murer*, the MSF paid 3,200 claimants additional benefits. (MSF Stipulated Fact No. 40.) That required a review of all claims between July 1, 1987, and June 30, 1991, which would have totaled approximately 60,000 claims using Department of Labor & Industry claim numbers for 1996. (MSF Stipulated Fact No. 40; attached Exhibit 1.) A review of 900 and 3,500 claim files, respectively, is minimal in comparison.

According to the MSF, the payment of an estimated $2.2 to $2.7 million in both benefits and costs would impair its financial condition. (MSF Stipulated Fact No. 60.) However, to date, the MSF has paid $2.1 million in benefit costs and fees pursuant to *Murer*. (MSF Stipulated Fact No. 40.) Despite these expenses, the MSF paid dividends to select policy holders totaling $11.9 million in fiscal years 2001 through 2003. (MSF Stipulated Fact No. 50.) During that same time period, the MSF only raised rates 3.5%. (MSF Stipulated Fact No. 51.)

Furthermore, Montana's current workers' compensation costs are 33% lower than they

were in 1995, and the MSF currently has a surplus of $121.6 million. (MSF Stipulated Fact Nos. 52 and 61.) Even if the MSF raised rates by 11.6% in fiscal year 2004, it is estimated that only .3% of that increase would be due to the impact of *Schmill*. (MSF Stipulated Fact No. 51 and 63.) As the Court noted in *Flynn*, even "[i]f policy holders must absorb the costs of complying with *Flynn*, they have already reaped the benefits of the State Fund's failure to take a pro-rata share of attorney fees into account when computing the social security offset." *Flynn* at ¶38. The same can be said with regard to *Schmill* and the apportionment issue.

For the foregoing reasons, it is clear that substantial inequitable results would not befall either LNW or the MSF if *Schmill* were to be applied retroactively. To the contrary, equity requires retroactive application so as to remedy years of unequal treatment of those afflicted with occupational diseases.

III. Did *Schmill* Create a Common Fund?

In *Means v. Montana Power Co.*, 191 Mont. 395, 403, 625 P.2d 32, 37 (1981), the Supreme Court adopted the common fund doctrine and defined it as follows:

> "The 'common fund' concept provides that when a party through active litigation creates, reserves, or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the 'stranger' (i.e. passive) beneficiaries do not receive their benefits at no cost to themselves."

There are three elements necessary to establish a common fund: (1) one party must create, reserve, or increase a common fund, (2) the active beneficiary must incur legal fees in establishing the common fund, and (3) the common fund must benefit ascertainable, nonparticipating beneficiaries. *Murer v. State Compensation Mutual Ins. Fund*, 283 Mont. 210, 223, 942 P.2d 69, 76 (1997).

The first requirement is the creation of common fund. The decision in *Schmill* requires workers' compensation insurers to recalculate temporary total and permanent partial disability benefit rates and entitlements for occupational disease claimants whose benefits were reduced due to apportionment. This recalculation will result in an identifiable monetary fund in which all beneficiaries will have an interest. As such, the first element is satisfied.

The second requirement is that the active beneficiary must have incurred legal fees in establishing the fund. Cassandra Schmill did pay an attorney fee on benefits received following the *Schmill* decision. (Exhibit No. 2.)

The final requirement is the creation of a group of ascertainable, nonparticipating

beneficiaries. In this case, that group is all occupational disease claimants whose benefits were reduced due to apportionment. LNW and the MSF have already identified these beneficiaries and thus this requirement is satisfied. (LNW Stipulated Fact No. 3; and MSF Stipulated Fact Nos. 26-29.)

The facts of *Schmill* are no different than those of *Murer, supra, Broeker v. Great Falls Coca Cola/Montana State Compensation Ins. Fund,* 275 Mont. 502, 914 P.2d 967 (1996), and *Flynn v. State Compensation Mutual Ins. Fund,* 312 Mont. 410, 60 P.3d 397 (2002). Cassandra Schmill engaged in active litigation which resulted in all workers' compensation insurers in the State of Montana being obligated to increase the temporary total disability rate and permanent partial disability benefit entitlement of all occupational disease claimants by removing the apportionment reduction. By so doing, a common fund was created.

The claimants encompassed by the common fund are all occupational disease claimants with claims arising out of occupational diseases which were first diagnosed as work-related between June 30, 1987, and June 22, 2001, and who had their benefits reduced pursuant to the apportionment statute. All of these claimants constitute the nonparticipating beneficiaries who will benefit from the *Schmill* decision. *Boeing Co. v. Van Gemert,* 444 US 472, 479 (1980). Each of these claimants has an equitable ownership of their respective share of the common fund whether they assert their right to it or not. *Id.* at 481-82. All that is needed to assert their right is to prove membership in the class by showing that their benefits were apportioned.

It is clear that the class of nonparticipating beneficiaries is not determined by the insurer's status as a party or nonparty, but by each claimants' entitlement to assert a right to benefits. Since that right became vested in each of the class members as identified above by reason of the *Schmill* decision, the above-stated class definition is correct.

IV. Does a *Schmill* common fund apply to nonparty insurers?

A *Schmill* common fund attorney fee attaches to all claims, not just those of the named insurer. The basis for this conclusion is rooted in the common fund doctrine itself, as well as the nature of this Court's jurisdiction over the attorney fee dispute.

According to the common fund doctrine, "a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole." [Emphasis added.] *Boeing Co. v. Van Gemert*, 444 US 472, 478 (1980). Moreover, the common fund doctrine applies in favor of a successful plaintiff even when a determinate fund does not arise. Such is the case because the trial court's power to award attorney fees is derived, not from the fact that a fund has been created, but from the broad "power of equity in doing justice as between a party and the beneficiaries of his litigation." *Sprague v. Ticonic National Bank*, 307 US 161, _____ (1939). Thus, even where a determinate fund has not been created, all beneficiaries of the fund can be assessed an equitable attorney fee.

The benefits forthcoming from the *Schmill* decision will not just be paid to claimants with a LNW claim, but to all claimants who have had their benefits apportioned. Since all such claimants are rightly considered beneficiaries of the efforts of Cassandra Schmill, all have an equitable obligation to share in the expenses of litigation.

Moreover, the Court's concern that it does not have jurisdiction over nonparties is mistaken. The *Schmill* decision created an entitlement to benefits which can be calculated on a case-by-case basis. Regardless of which insurer pays these benefits, an identifiable class of claimants will receive these benefits. The benefits received by this class of claimants constitutes the common fund. By filing an action for fees against this common fund, *Schmill's* counsel has initiated an in rem action. A judgment in rem adjudicates the status of a thing or subject-matter, compared to a judgment in personam which binds a judgment debtor. *Gassert v. Strong*, 38 Mont. 18, 98 P. 497 (1908). Since common fund attorney fees are to be paid by the beneficiaries from their benefits, the action is in rem.

When an action is in rem, "jurisdiction may be acquired by the mere bringing of the suit in which a claim is sought to be reinforced against property situated within [the Court's] territorial jurisdiction." *Gassert*, 98 P. at 501. The property is considered to be within the territorial jurisdiction of the Court either by actual seizure, or "by merely bringing of the suit in which a claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit." [Citation omitted.] *Id.*

Since the Court has jurisdiction over the common fund, it has the right and obligation to assess a reasonable attorney fee against all benefits in the fund. This is consistent with the obligation of all beneficiaries of the common fund to share in the expenses of litigation: "Unless absentees contribute to the payment of attorney's fees incurred on their behalf, they will pay nothing for the creation of the fund . . ." *Boeing*, 444 US at 480.

The creation of a common fund in the context of entitlement to workers' compensation benefits is clearly different than other common fund actions. In nonworkers' compensation cases, only the named defendants are going to be obligated to pay the common fund. All potentially liable defendants and all nonparticipating beneficiaries are joined by means of a class action. In workers' compensation cases a precedent such as *Schmill* obligates all insurers, whether parties to the action or not, to pay the increased benefits. Yet unlike civil cases, the use of class actions is discouraged in workers' compensation cases in favor of requests for common fund attorney fees. Therefore, if the Court is requesting that requests for common fund attorney fees be used instead of motions for class certification, there should be a willingness to recognize that common fund attorney fees attach to benefits received by all nonparticipating beneficiaries, not just those of the named insurer. The Court has the jurisdiction to so rule, and the common fund doctrine supports such a conclusion.

CONCLUSION

For the reasons stated above, *Schmill* asks this Court to find that there was no waiver of common fund attorney fees; to apply the Montana Supreme Court's decision in *Schmill* retroactively; to find that a common fund was created by the decision in *Schmill*; and to find that common fund attorney fees are due from all nonparticipating beneficiaries, not just those of the named insurer.

RESPECTFULLY submitted this 26 day of March, 2004.

ATTORNEYS FOR PETITIONER

BOTHE & LAURIDSEN, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193

By: Laurie Wallace
LAURIE WALLACE

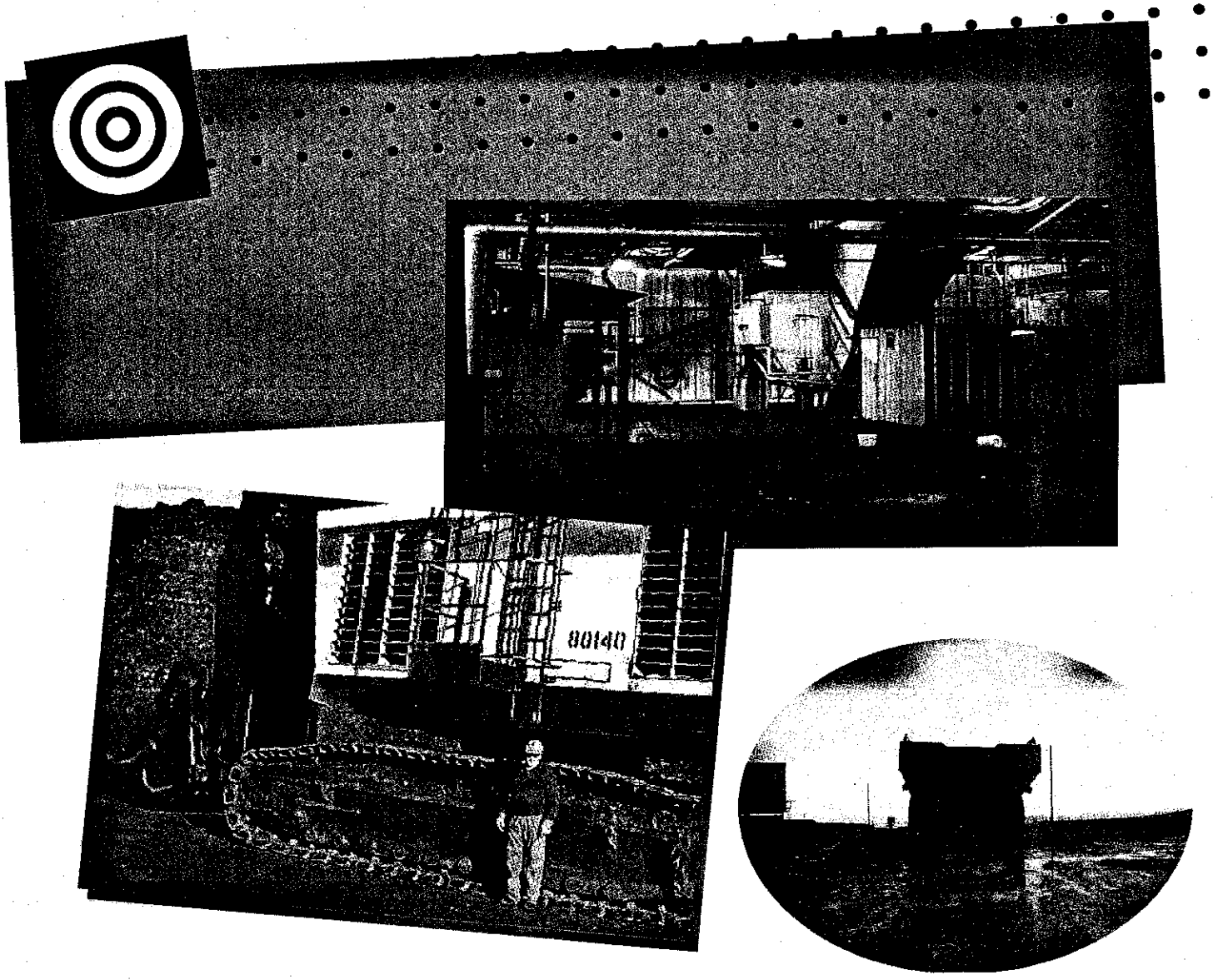
Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 26 day of March, 2004, I served a true and accurate copy of the PETITIONER'S BRIEF REGARDING COMMON FUND AND RETROACTIVITY ISSUES by U.S. mail, first class, postage prepaid to the following:

Mr. Larry Jones
Liberty NW Ins. Corp.
700 SW Higgins, Ste. 108
Missoula, Montana 59803-1489

Mr. Bradley Luck
Garlington, Lohn & Robinson
P.O. Box 7909
Missoula, MT 59807-7909

Robin Stephens
Robin Stephens



Montana

Workers' Compensation 2000 Annual Report

EXHIBIT

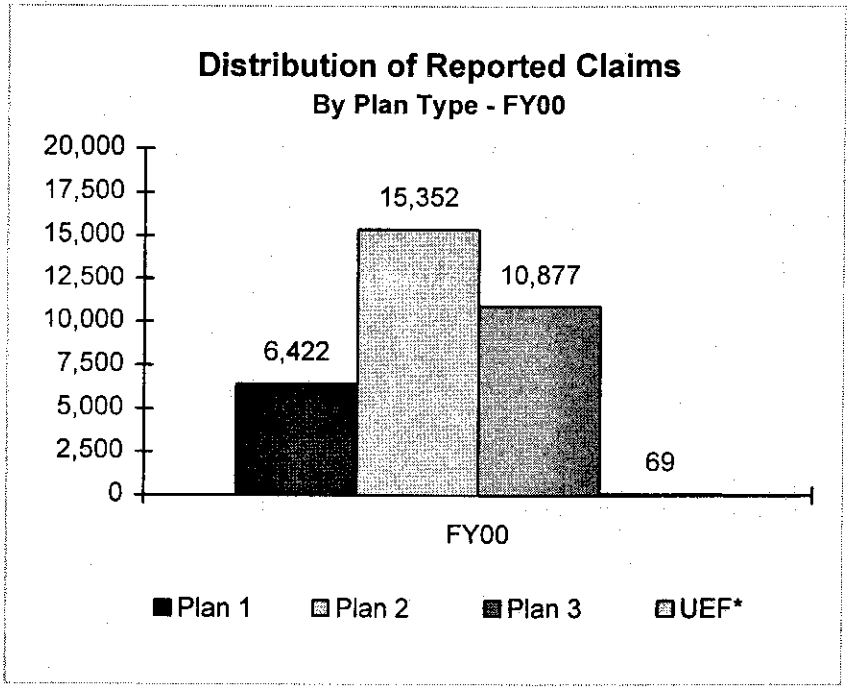
1

Employment Relations Division

MONTANA DEPARTMENT OF LABOR & INDUSTRY

Comparison of Claims by Plan Type

This section provides the most current statistical summary available on the status of Montana's workers' compensation system. This section is based on the First Report of Injury and includes indemnity and medical only claims.



Notes:
The number of total claims is continually changing.
*UEF means Uninsured Employers Fund.
FY means Fiscal Year, the period of time between July 1 and the succeeding June 30.

Distribution of Reported Claims
By Plan Type

	FY96		FY97		FY98		FY99		FY00	
Plan Type	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**	**Count**	**Percent**
Plan 1	6,705	20.5%	7,967	23.6%	7,409	23.2%	6,847	21.6%	6,422	19.6%
Plan 2	10,562	32.2%	12,228	36.2%	13,665	42.8%	13,975	44.1%	15,352	46.9%
Plan 3	15,353	46.9%	13,470	39.9%	10,736	33.6%	10,743	33.9%	10,877	33.2%
UEF	148	0.5%	130	0.4%	127	0.4%	91	0.3%	69	0.2%
Total*	***32,768***	***100%***	***33,795***	***100%***	***31,937***	***100%***	***31,656***	***100%***	***32,720***	***100%***

Notes:
UEF means Uninsured Employers Fund.
FY means Fiscal Year, the period of time between July 1 and the succeeding June 30.
*Column may not sum 100% due to rounding.

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"Attorneys for Petitioner"

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NW INS. CORP., Respondent. and MONTANA STATE FUND, Intervenor,	WCC NO. 2001-0300 AFFIDAVIT OF LAURIE WALLACE

STATE OF MONTANA)
: ss
County of Flathead)

I, LAURIE WALLACE, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed with the law firm of Bothe & Lauridsen, P.C. of Columbia Falls, Montana.

2. That Bothe & Lauridsen, P.C. are attorneys for Petitioner in the above-captioned case.

3. That following the *Schmill* decision, Cassandra Schmill received $1,438.42 in additional benefits out of which she paid $359.61 in attorney fees.

EXHIBIT
2

DATED this 26 day of March, 2004.

Laurie Wallace

Subscribed and sworn to before me this 26 day of March, 2004.

Notary Public for the State of Montana
Residing at Columbia Falls
My Commission Expires: 7/17/04